



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE NO. 1281 OF 2012**

ALEX GICHUKI GAKURU.....CLAIMANT

VERSUS

THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

KENYA WILDLIFE SERVICE.....2<sup>ND</sup> RESPONDENT

**JUDGMENT**

**Introduction**

1. The Claimant was employed by the 2nd Respondent on 29th January 2001 at Tsavo East National Park earning a basic salary of KShs. 9751.00. However, he was suspended from duty by the letter dated 4th December 2003 after being arrested and subsequently charged with the offence of theft by servant in *RMCC No. 498 of 2003; R vs. George Maina & 2 Others*. The suspension was without pay pending the outcome of the said case and it was backdated to 29.8.2003 when he was arraigned before the court. After the trial, the claimant was convicted and sentenced to a jail term but he appealed against the conviction and sentence. Before the outcome of the appeal, he was dismissed from service with effect from 24th November 2004 vide the letter dated 27.12.2006. At the time of dismissal, he was earning a basic salary of KShs. 11,139.00.

2. Thereafter, Claimant's appeal was heard and allowed, resulting in the Claimant's acquittal on 24th July 2009. However, he was neither reinstated to his job nor was he paid his terminal dues. Aggrieved by the 2nd Respondent's actions, the Claimant filed the cause herein contending that his dismissal was wrongful and sought the following reliefs:

- a) A declaration that the retrogressive dismissal from employment by the Respondent on 27th December 2006 was wrongful.
- b) An order that the Claimant be reinstated to his employment in the same capacity and salary he was being paid by the 2nd Respondent prior to his dismissal.
- c) The full salary from August 2003 to date
- d) Contributions made while in service.
- e) Severance pay and all terminal dues computed as KShs.954,814.28.
- f) Any other relief that this Honourable Court may deem fit to grant.
- g) Costs.

3. The 2nd Respondent filed its Memorandum of Reply on 1st October 2012 admitting that she dismissed the Claimant but denied that it was wrongful. She averred that the dismissal was proper and fair and prayed for the Claimant's prayer of reinstatement to fail and the suit be dismissed.

4. The suit was heard on 26th November 2018 where the Claimant testified as CW1 and the Respondents called Vincent Makan Samoo who testified as RW1. The claim against the 1st Respondent was, however, withdrawn. Thereafter both parties filed their written submissions.

### **Claimant's Case**

5. CW1 testified that he was currently a house agent at Ongata Rongai. Before this, he was an employee of the 2nd Respondent earning a monthly salary of KShs. 11,139.00. However, he was sent on suspension without pay, from 29th August 2003 after he was arrested and charged with the offence of theft by servant. The suspension was to remain until the outcome of the said criminal case.

6. The Claimant further testified that by the letter dated 27th December 2006 he was dismissed from service with effect from 24th November 2004. He contended that he was never given a chance to defend himself before the 2nd Respondent prior to the dismissal. He further contended that, although he was sent on suspension, pending the outcome of his Criminal Case, he was dismissed prematurely before then since his appeal was still pending.

7. The Claimant further contended that his dismissal came before the Respondent's HR Policy was implemented. Finally, he adopted the averments in his Memorandum of Claim and prayed for the reliefs sought in his Claim.

8. During cross examination, the Claimant admitted that his letter of appointment referred to the existence of a HR Policy but contended that he was never shown any. He admitted that he never notified the 2nd Respondent about his appeal against the conviction but contended that he had no obligation to do so. He further admitted that his suspension letter indicated that he would not receive any salary pending the outcome of his trial but contended that his employment was terminated for no valid reason since he was acquitted on appeal. He also admitted that he was resting on public holidays and took all his annual leave save for the year 2003. He concluded by stating that he was not involved in the investigation process that led to his suspension.

### **The 2<sup>nd</sup> Respondent's Case**

9. Vincent Makan Samoo, testified as RW1 and adopted his written witness statement dated 15th October 2018, as his examination in chief. He testified that the Claimant was suspended vide the letter dated 4th December 2003 which was backdated to 29th August 2003, because the Claimant was arrested then. He further stated that the reasons for the suspension were cited as theft and false accounting between 8th March 2002 and 13th July 2003. That the suspension was to subsist until the outcome of the criminal case which outcome was a conviction and sentence of 18 months. That thereafter, the Claimant was served with his letter for summary dismissal dated 27th December 2006 which cited the reason for dismissal as his arrest and detention that led to loss of trust. He further stated that the Claimant never informed the 2nd Respondent that he was appealing against the conviction.

10. RW1 further testified that the dismissal letter offered the Claimant the following dues, payable once the Claimant cleared with the Respondent:

- a. Salary and allowances up to 24th November 2004.
- b. 2 months salary in lieu of notice.
- c. Payment of the Claimant's pension contribution.

RW1 conceded that the Claimant was yet to be paid his dues as he had cleared partially. He had cleared

with his station but was yet to clear with the Headquarters. It was his testimony that the Claimant's position was filled. It was his position that due process had been followed in dismissing the Claimant.

11. During cross examination, he testified that the Claimant was arrested after the 2nd Respondent lodged a complaint. He confirmed that the Claimant was at nil pay pending the outcome of the case. It was his testimony that the Appeal was concluded in 2009 but contended that the 2nd Respondent was not involved in or informed of the appeal.

12. RW1 further testified that the delay by the police to update the employer about the progress of case also delayed the dismissal of the claimant up to December 2006 and that is the reason why the termination was backdated to 2004, when the Claimant was convicted. He further contended that the Claimant was involved in the investigation that was carried out but admitted that he had no documents to prove that the Claimant had been accorded an opportunity to present his side of the story. He explained that the Claimant was not issued with a notice for disciplinary hearing because the matter was pending in court. He further admitted that the employer conducted an internal investigation but the findings were not enough to sustain criminal charges and that is why the police were called. He added that the Claimant would have been reinstated had he been acquitted.

### **The Claimant's Submissions**

13. In his written submissions dated 29th November 2018 and filed on 30th October 2018, the Claimant posits that he cannot be blamed for the 2nd Respondent's negligence in failing to follow up on the case to know of its conclusion. It is his submissions that his failure to clear at the KWS should not be held against him bearing in mind the circumstances surrounding his dismissal from employment. He contended that the Respondent admitted to owing him the unpaid salary and as such, he should be paid unconditionally.

14. The Claimant also submits that the 2nd Respondent offended the provisions of the Employment Act and the rules of natural justice, in terminating the Claimant's employment without according him a hearing. He concluded by asserting that he had proved his case on a balance of probabilities hence should be granted the prayers sought.

### **The 2<sup>nd</sup> Respondent's Submissions**

15. In their submissions dated 7th December 2018 and filed on 10th December 2018, the 2nd Respondent submits that the Claim should be dismissed with costs because the Claimant has not exhausted all internal mechanisms as was communicated to him in his letter of dismissal and as required by section 9 of the Fair Administrative Action Act 2015. She relied on the case of ***Jackson Butiya vs. Eastern Produce Limited; Industrial Cause No. 335 of 2011*** where the Court held that:

***“An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to court and say “I refused to talk with those people therefore I was not heard, order them to pay me.” It is not the role of the court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.”***

16. She further contended that the Claimant ought to have informed his employer of the impending appeal and told them to hold his dismissal in abeyance pending its hearing and determination. Finally, she submitted that the Claimant admitted that he went for some annual leaves and public holidays and urged the court to find that the Claimant is not entitled to the reliefs sought because he has not proved his case.

### **The Analysis**

17. After careful consideration of the pleadings, evidence and the submissions presented by the parties and their respective counsel, there is no dispute that the Claimant was employed by the 2nd Respondent, sent on suspension on nil pay and thereafter summarily dismissed after he was convicted and sentenced to jail. The Claimant was to be paid his terminal dues upon clearance, which is yet to be done. The

Claimant appealed the trial court's decision to the high court and the decision was overturned and the claimant acquitted. The issues for determination are therefore summarized as follows:

- a. Whether the Claimant was wrongfully dismissed from his employment.
- b. Whether the Claimant is entitled to the reliefs sought.

### **Whether the Claimant was wrongfully dismissed from his employment**

18. The Claimant has submitted that he was dismissed from employment without being accorded a fair hearing. On the other hand, the 2nd Respondent submits that the Claimant has not exhausted all internal mechanisms as was communicated to him in his letter of dismissal. The applicable law to this case is the repealed Employment Act.

19. Section 17 paragraph (g) of the Employment Act, Cap 226 (Repealed) provides as follows:

***17. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal -***

***(g) if an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.***

20. The Court of Appeal in the case of *Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR* held that:

***“Prior to 2007, employers had no obligation in observing principles of natural justice in termination of employment of contracts. Employers could terminate contracts of employment at will, for good cause, bad cause or no cause.”***

21. The Claimant's suspension letter was clear that his suspension would subsist until the outcome of his case. The case was concluded in 2006 and the Claimant convicted and sentenced to 18 months imprisonment. The 2nd Respondent drew the conclusion that the Claimant had been found guilty and thereafter summarily dismissed him. The Claimant did not communicate his decision to appeal neither did he seek to have his dismissal halted, as such the 2nd Respondent was under the misguided perception that the case had been concluded. Without the decision of the appellate court, the conviction of the claimant by the trial court was justifiable reason for the summary dismissal.

22. Under the said repealed Act, the employer was under no obligation to accord an employee a hearing or communicate the reasons for termination unless it was provided for under a written contract of service or HR policy manuals or Collective Agreement (CBA). The foregoing view is fortified by the holding in *Rift Valley Textiles Limited vs. Edward Onyango Oganda [1994] eKLR* where the Court held as follows:

***“The rules of natural justice have no application to a simple contract of employment, unless the parties have specifically provided in their contract that such shall apply. Where there is a notice period in the contract of employment...then an employer need not assign any reason for giving notice to terminate the contract and if the employer is not obligated to assign a reason, the question of offering an employee a chance to be heard before giving notice does not and cannot arise. Again, if the employee were to be minded to leave his employment, save for a better job and he gives notice of his intention to leave, the employee is not obliged to assign a reason... Unless there is a specific provision for the Application of rules of natural justice to a simple contract of employment, those rules are irrelevant and cannot found a cause of action.”***

23. In view of the foregoing, I am of the opinion that the Claimant has failed to prove on a balance of probability that his dismissal was wrongful. The respondent lost trust in him after the conviction and fired him summarily. He has not proved that the procedure followed was wrong either under the written contract or HR Policy manual which he confessed that he was never shown any during his employment. He also never took the precaution by notifying the employer about his pending appeal so as to forestall the eminent dismissal. Finally, the employer offered to pay terminal dues to him but he failed to complete his clearance which was a precondition to the payment of his dues.

### **Whether the Claimant is entitled to the reliefs sought**

24. The Claimant has prayed for a declaration that the retrogressive dismissal from employment by the Respondent on 27th December 2006 was wrongful. Having found that the Claimant failed to prove, on a balance of probabilities, that his summary dismissal was wrongful; the Court cannot grant this prayer and it therefore fails.

25. The Claimant further seeks for an order to reinstate him to his employment in the same capacity and salary he was being paid by the 2nd Respondent prior to his dismissal. RW1 testified that the position was filled after the Claimant's dismissal. Moreover, many years have passed since the Claimant's dismissal and the parties have moved on. An order for reinstatement would also not be appropriate in this case because the employer contended that she had lost trust in him.

26. The Claimant prayed for full salary from August 2003 to date. During trial, RW1 testified that at the time of dismissal they were ready to give the Claimant salary and allowances up to 24th November 2004. However, the Claimant's employment was terminated in 2006 and the 2nd Respondent's backdating does not alter this material fact. Since the 2nd Respondent has admitted that the Claimant was not paid his dues, I am of the opinion that he should be awarded his salary from the time of suspension up to the date of his actual dismissal being 27.12.2006 subject to clearing with 2nd Respondent.

27. The Claimant is also entitled to two months payment in lieu of notice and payment of his pension contribution up until the time of his dismissal, this being the dues that the 2nd Respondent has admitted that they are owing and which were offered vide the termination letter.

28. The Claimant's prayer for payment of public holidays fails as the Claimant admitted to having gone for those holidays. In as regards the claim for accrued annual leave the Claimant admitted that he took all his leaves save for the year 2003, a fact which was not disproved by the 2nd Respondent. Consequently, I award his prayer for payment of leave only for the year 2003.

29. The Claimant's prayer for payment of his expenses incurred during trial is by its nature special damages and it must fail due to lack of particulars and evidence to the same. In addition, he has not proved that the criminal proceedings were maliciously instituted by the 2nd Respondent.

### **Conclusion and disposition**

30. I have found that the termination of the claimant's employment was for a valid and justifiable reason and therefore not wrongful. I have, however, found that he is entitled to some of the reliefs sought. Consequently, I enter judgment for him against the 2nd Respondent for the following:

- a) 2 months salary in lieu of notice.....Kshs.22,279.00
- b) Salary from August 2003 to 27.12.2006  
(Kshs 11139.5 x 40 months).....Kshs.445,580.00
- c) 21 leave days for 2003 (21/26xKshs.11139.50).....Kshs.8,9972.30

**Total Kshs.557,831.30**

The claimant will have costs plus interest at court rates from the date of filing the suit. The award is subject to statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 8th day of March, 2019**

**ONESMUS N. MAKAU**

**JUDGE**